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Supreme Court, U.S.
FILED
AUG 5 , 2005
OFFICE OF THE CLERK

**CASE # 04-1144**

***In The Supreme Court Of The United States***

Kelly A. Ayotte, Attorney General of New Hampshire

PETITIONER

Vs.

Planned Parenthood of Northern New England, et al.

RESPONDENT

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

# BRIEF OF MARGIE RILEY AND LAURETTE ELSBERRY AS AMICII CURIÆ IN SUPPORT PETITIONER WITH APPENDIX

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## THE QUESTIONS PRESENTED FOR REVIEW

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

**STATEMENT OF INTEREST[1]**

*Amicii* are individual activists seeking an end to abortion as it impinges on a member of Sovereignty, Posterity. They share the views of counsel who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, downtrodden, and oppressed.

Margie Reilly graduated from St. John's University, Jamaica, New York with a *summa cum laude degree* in Management. Number two in her class, Beta Gamma Sigma Business Honor Society. She is the granddaughter of a former United States Congressman John Rainey of Illinois, deceased. Most of her career has been with the Federal Government: Defense Logistics Agency, NYC, NY and McClellan AFB, N Highlands, CA as well as Social Security Administration where she retired early as a service representative. She is now employed as a substitute schoolteacher with San Juan Unified School District and Sacramento City School District where she takes K-12 assignments on a part time basis and specializes in preschool and Head Start early childhood programs. She has been actively involved in the prolife movement for many years as a sidewalk counselor, member of her Diocesan prolife committee and supports many prolife causes including Priests for Life, American Life League, Prolife Action League of Chicago, National Right to Life, Bishop Gallegos Maternity Home,

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[1] Lead Counsel for *Amicii Curiae* authored this brief in its entirety in collaboration with the Pacific Justice Institute. No person or entity, other than the Pacific Justice Institute and the named *Amicii curiae*, associates, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief.

SOHLNET, Couple to Couple League, Loaves and Fishes, and Sacramento Food Bank and other worthy charities. She participated in the Washington, D.C. March for Life in 2001, and the San Francisco, CA March for Life in 2004. Most recently, she testified before the Sacramento County Board of Supervisors against a "no protest bubble zone" that stifled the free speech rights of prolife activists at abortion clinics and medical facilities in the County.

Laurette Elsberry has been employed over 40 years by the State of California, the most recent 20 years as a criminal analyst, has been victimized for her prolife activities and participated in the editing a number of briefs on the abortion issue. She has been active in many educational projects involving abortion and has participated in vigils for the unborn. She has also given testimony at the State Supreme Court regarding the qualifications of State Court Justices.

Lead Counsel is affiliated with the Pacific Justice Foundation, and has presented similar *Amicii Curiae* Briefs in this court,[2] a former professor of Law, University of Northern California, Lorenzo Patiño School of Law, affiliated with pro-life groups, has concentrated his practice in the areas of Civil and Human Rights, Constitutional Law, Criminal Defense, and authored two articles: Lynch, ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE; A PROSPECTIVE POLICY (© 1987), http://www.jamesjosephlynchjr.com/ProlifePages/ARTICLES/ABORTION.DOC (Hereinafter, LYNCH I); Lynch, *Posterity: A Constitutional Peg for the Unborn*, 45 AJJ 401; http://www.jamesjosephlynchjr.com/Articles/UNDLS.htm (Notre Dame Law School. 1995) (Hereinafter, LYNCH II); He lived four years in England where he engaged in a self-directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (For Appellant); *Ohio v. Akron Reproductive Center*, 497 U.S. 502 (1990) (For Appellant); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) (For Minnesota; 2 Briefs); *Bray v. Alexandria*, 506 U.S. 263 (1993) (For Petitioner). Counsel has also presented an *Amicii* brief in other unrelated cases. *Walters* v, *NARS*, 473 U.S. 305 (1925) *(amicus Curiae* Andrew Groza for respondent); *Dickerson v. USA* (*Amicus Curiæ* Rutherford Institute for Petitioner), 530 U.S. 428 (Rutherford Institute for petitioner). While not filed, *Turnock v. Ragsdale*, 503 U.S. 916 (1992) was dismissed after a tentative opening brief was submitted to ACLU for review prior to filing. (For Appellant)



Pacific Justice Institute is a non-profit 501(c)(3) legal organization specializing in the defense of religious freedom, parental rights, protection of life, and other civil liberties. The Institute works diligently, without charge, to provide clients with legal support and assistance in these areas of the law in order to secure the rights and freedoms inherent to all Americans.

This case touches and concerns the First Amendment rights of parental communication with children and the continuing validity *of Roe v. Wade,* 410 U.S. 113 (1973) and its *progeny*, and, as such, a decision herein will affect not only the laws of the State of California, but all of its sister states and territories of the United States.[3] This Court's *Amicii* is concerned about the inclusion of "unborn and partially born children" (hereinafter, "unborn children") as present members of "Posterity" in the Preamble of the Constitution, and convinced then, and *Amicii* is convinced now, that the Court was misled as to the meaning of "personhood." It is *amicii curiae's* belief that "unborn children" are present members of "Posterity" in the Preamble of the Constitution, and it is imperative, for the preservation of a basic respect for human life and the values enshrined in the Constitution of the United States, that these children be recognized as present members of "Posterity" entitled to protection.

[3] Cases are pending appeal regarding the same, or similar issues. See, *Planned Parenthood v. Ashcroft, 9th Cir. # 04-16621; Carhart et al v. Ashcroft*, 8th Cir., # 04-3379; *National Abortion Federation, et al v. Ashcroft*, 2nd Cir., 04-5201.

## SUMMARY OF ARGUMENT

1. This court has long recognized that the parent child relationship to be a protected interest that the state may not interfere with, absent arbitrary conduct by the parent which endangers the life, health, or safety of the child, such that the decision below is lacking in sufficient support to be sustained.

2. Unconstitutional conduct cannot be justified by widespread and long use. With respect to the Constitution, *stare decisis* is of less importance than in other areas, and therefore the holding of *Roe v. Wade* and its *progeny* is not necessarily binding on this Court.

3. As this Court has recognized aliens and artificial persons as entitled to protection, it is an anomaly to exclude "unborn children" as entitled to protection given that, while the Preamble does not create rights, it does define for whom the rights were created, which would include the "unborn children" as members of "Posterity," an interpretation that appears to be consistent with the intent of the framers, and a common law understanding, that "unborn children" were persons in being, therefore protected by the Constitution.

4. Since *Roe v. Wade* was decided, Congress, with plenary control over citizenship, appears to have extended the protection of citizenship to the "unborn children" as arguably following under the penumbra of "posterity," which should be accorded the respect due a coordinate branch of government, representing a changed circumstance justifying review.

5. Based upon the foregoing, this court should grant certiorari to resolve whether *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny* are in fact viable in the face of a growing body of literature that suggests that the court erred.



## ARGUMENT

### I.

### IN VIEW OF THE FIRST AMENDMENT, AND STARE DECISIS, THE PARENT-CHILD RELATIONSHIP, AND COMMUNICATIONS INCEDENTAL THERETO, CANNOT BE RESTRICTED

This court has long recognized that the parent child relationship to be a protected interest that the state may not interfere with. *See, Stanley v. Illinois*, 405 U.S. 645 (1972) (Termination of parental rights); *Mattis v. Schnar*, 502 F.2d 588 (8th Cir. 1974), *vacated* and *remanded sub nom Ashcroft v. Mattis*, 431 U.S. 171; *Santosky v. Kramer* (1982) 455 U.S. 745; *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Brower*, this court found a protected interest of the parent in their child from which they had standing under 42 U.S.C., § 1983 to sue for the wrongful death of their child. From *Brower*, it follows that any person, acting under color of law who deprives parents of, or otherwise interferes with the communications with, their children would be subject to liability under 42 U.S.C., § 1983.

It is a time-honored tradition of American courts to sustain the governmental interest in health and medical treatment of the populace and override individual religious objections. 4 Rotunda, Treatise on Constitutional Law, Free Exercise, § 21.9(b). However, the context of the cases suggests that this is true only in the area of communicable diseases where vaccination and quarantine is the chief weapon of defense against an epidemic (Id, § 21.9(b)(1).) and where parental powers are exercised to withhold medical treatment for children on religious grounds. Id, § 21.9(b)(2). However, the context of those later cases suggests that the **courts have refused to veto such powers where alternative treatment was provided and beneficial**, or unrelated to preservation of the child's life. Ibid., footnote 21.

The sole justification for the decision below, then, is the District Court's reliance on the *Roe v. Wade* line of cases with respect to parental notification laws that the minor-mother has a right to judicial bypass for consent, and that the procedures instituted by New Hampshire do not adequately prevent the parents learn of the pregnancy. It important at the outset~~, it is important~~ to note that this court has held that notification to the parent is permissible, so long as the parent does not have veto power. This Court has never suggested that a state may not give notice to the Parents.

The instant case is a gross departure in denying parents any input in the raising and upbringing of their child, which this court ought not accept, and, indeed, this court ought now to discard Roe as unsound in principal and unworkable in practice.

## II.

## STARE DECISIS IS LESS BINDING IN CONSTITUTIONAL ISSUES DESPITE LONG STANDING AND WIDESPREAD PRACTICE; ROE AND ITS PROGENY DID NOT CONSIDER THE TERM "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Statutes or practices inconsistent with the Constitution, however pervasive, cannot create a power that the Constitution does not bestow, nor furnish a construction that the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649 (1891); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867) (Invalidating USSC rules); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown 1) (*overruling Plessy* v. *Ferguson*, 163 U.S. 537 (1896); striking down 58 years of "separate but equal" doctrine); a*ccord, Bolling v. Sharpe*, 347 U.S. 497 (19543 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986). Moreover, where the importance of the question is great, and touches sensitive issues that need to be resolved, this Court has not allowed the fact that some issues were not properly addressed in the courts below to prevent further argument on the issues omitted so that the continuing controversy could be settled. Brown I, 347 U.S., at 489, 496;



*Brown v. Board of Education.*, 349 U.S. 294, 298 (1955) (*Brown II*) (for remedy).

The questions presented herein touch sensitive issues that need to be resolved. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the court noted that Roe[4] stood at the intersection of two lines of decisions. One, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), are those cases which found a right to privacy in which the state had no right to interfere with personal choices regarding sex,[5] family, and whether to bear and beget children. *Casey*, 505 U.S., at 857. The other line of cases found there exists a certain individual autonomy that limited governmental power regarding medication and the right to die, which supports the *Roe* conclusion. *Ibid.* The *Casey* plurality suggests that *Roe* might be *sui generis*, i.e., one of a kind, but since there had been no erosion of its central premise, noting the change in membership and squabbling among the justices, even if the court were to assume error by *Roe*, "it only went to the strength of the state interest in fetal protection, not to the rec-

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4 Interestingly, the Roe citations in support of a woman's right to privacy simply do not support an absolute right to privacy. Indeed, in what appears now to be a false first step, the High Court observed the right to privacy was first noted in 1891, citing a case that had nothing to do with a constitutional issue. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *but cf, Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1940). *Sibbach* teaches that *Botsford* was not a substantive rule of constitutional law of privacy, but rather, one of statutory construction. In 1891, there was no authority for a physical examination of a plaintiff, a legislative omission cured by the Federal Rules of Civil Procedure, Rule 35, which was no affront to privacy because the plaintiff voluntarily advanced the issue by bringing suit.

5 The court has not been consistent with respect to sex. For instance, in *Bennis v. Michigan*, 516 U. S. 442 (1996), where a man engaged in sexual intercourse with a prostitute in the family vehicle, was caught, the vehicle was subject to forfeiture, and the wife of the man could not redeem her community property interest, notwithstanding she had no knowledge of the act. No case has held that a woman, based on her right to privacy, can do whatever she wishes with her body. *A fortiori*, if "unborn children" are persons in the constitutional sense, it is not possible that a woman has an absolute right to take the child's life.

ognition by the Constitution of the woman's liberty." *Casey,* 505 U.S., at 858-59. The soundness of Roe, said the *Casey* Court, was apparent from a consideration of the alternative. "If indeed, the woman's interest in deciding whether to bear and beget a child had not been recognized in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey,* 505 U.S., at 860. After a review of *stare decisis,*[6] the lack of anything new regarding the status of unborn children, and in view of widespread reliance, *Casey* abandoned *Roe's* trimester periods, and affirmed both women's rights and the "State's interest in protecting human potentiality" after viability, provided there was no undue burden on a woman's choice. *Ibid.*

*Casey* begs important questions. The central issue is not whether a woman has a right to decide whether to beget children; of course she does. And of course there is no issue as to termination of a pregnancy; all pregnancies will terminate at the end of term, by natural birth, caesarian section, or otherwise. The issue *is:* whether a woman has the right to choose to terminate the life of "unborn children" once begot where the life and health of the mother is not at risk. The *Roe* Court reached the result it did because, it said, Texas had failed to demonstrate where in the Constitution "unborn children" were Constitutional persons. 410 U.S., at 157-59.[7] *Casey* perpetuates the *Roe error* on the basis there has been no development in constitutional theory that undermines the *Roe*

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[6] Justice O'Connor conceded there was an erosion of support by the justices as to the continued validity of Roe.

[7] A reading of the Petition, Response, and Briefs by the parties and *Amicii in Roe* shows the primary focus was on the term person as found in the 5th and 14th Amendments. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.



premise. Neither opinion addresses the term "Posterity"[8] in the Preamble, nor its meaning. Furthermore, there has been a growing recognition that this Honorable Court erred. COMMENTS, TO BE AND NOT TO BE: INCONSISTENCIES IN *THE LAW* REGARDING THE LEGAL STATUS OF THE UNBORN FETUS, 71 Temple Law Review 963, 994 (1998) (hereinafter, To Be and Not to Be.); Notes, Fourteenth Amendment Personhood; Fact or Fiction?, 73 St. John's Law Review 495, 530-40 (1999) (hereinafter, *Fourteenth Amendment* Personhood); LYNCH I, *supra*; LYNCH II, *supra.*[9]

This court can judicially notice the impact on the judiciary by abortion cases, and that this Court's opinions have been heavily criticized as being unsound in principle and unworkable in practice. *To Be and Not to Be;* Fourteenth Amendment Personhood, supra ("our judiciary is dishonest in its treatment of fetuses"); Lynch I and II, *supra.* Similarly, it is well known that the abortion controversy has led to disorder in the streets throughout the country.[10] Moreover, beginning with *Webster v. Reproductive Health Services,* 492 U.S. 490, 518-519 (1989) (Rehnquist, Ch. J.), this Court has increasingly found "*Roe* to be unsound in principle and unworkable in practice." The most critical voice of this court's position came from this Honorable Court's Justice Scalia in dissent in *Stenberg v. Carhart,* 530 U.S. 914, 953 (2000).[11] In

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[8] Douglas, J., mentioned "liberty," but that was hardly an exposition on the meaning of "Posterity" in the Preamble.

[9] Notwithstanding widespread availability in print, and on the web, no article has ever purported to demonstrate the unsoundness of the approach taken in either Lynch I or Lynch II.

[10] It is not suggested that disorder is a reason for overruling *Roe.* The reason is "unborn children" are persons who are present members of "Posterity" in the Preamble of the Constitution.

[11] "The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from

fact, a proper reading of the Preamble *in pari materia* with the body of the Constitution shows that:

A person is created at conception. Preamble.
A person becomes a citizen at birth. 14th Amend, § 1.
A person can vote at age 18. 26th Amend, § 1.

Congress has not been silent. In 2002, it adopted definitions for "person," "human being," "child," and "individual" as including "born-alive infants." 1 U.S.C., § 8.[12] Section 8 goes beyond mere definition to recognize and preserve the common law rights[13] of "any member of the species homo sapiens at any point prior to being "born-alive"" as defined within that section. Id, subsection (c). The Congress has also adopted Partial Birth Abortion Act. 18 U.S.C., § 1351, Public Law 108-105 (2003), App., p. A7ff.

Thus, this Court should now recognize, in light of the above, that this Court has retreated from *Roe v.*

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simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

12 Sec. 8. "Person", "human being", "child", and "individual" as including born-alive infant

"(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

"(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

"(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section." Added Pub. L. 107-207, Sec. 2(a), Aug. 5, 2002, 116 Stat. 926.)

13 1 Blackstone, Commentaries on the Law of England, p. 126; Appendix , p. A6: "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. ...." Id, p. 126. Appendix, p. A6.



*Wade*, 410 U.S. 113 (1973), and in light of the arguments to follow, should *overrule Roe.*

**III.**

**IT IS BECOMING INCREASINGLY CLEAR THAT THE "UNBORN CHILDREN" ARE PRESENT MEMBERS OF "POSTERITY"**

Neither the 5th Amendment nor the 14th Amendment defines personhood. The 14th Amendment only defines citizenship.[14] In other contexts, this Honorable Court has held that aliens,[15] and artificial persons[16] are persons entitled to Constitutional protection.[17] Not to recognize the "unborn children" as persons is therefore an anomaly.[18] As "Person," is used without qualification, the most logical place to look for meaning is the Preamble,[19] because while its purpose

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14 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof ..."

15 *E.g., Hampton v. Mow Sun Wang*, 426 U.S. 88 (1976); Const., Art. VI, Treaty Clause; McKechnie, *Magna Carta*, Art. 41 (Aliens).

16 *See, Chicago B. & Q. R.R. Co. v. Iowa*, 94 U.S. 155 (1877); *E.g., Land v. Dollar*, 330 U.S. 731 (1974) (*Replevin*; Stock taken under color of federal law).

17 In virtually every context outside the abortion debate, the unborn are recognized as a person. *See,* Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 Association for Interdisciplinary Research in Values and Social Change (March/April 1997); *Civil Rights – Fetus as a Person*, 64 ALR Fed 886; Wasserstorm, *Homicide Based on Killing of Unborn Child*, 64 ALR5th 671; Wakefield, *Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy*, 15 ALR4th 548.

18 At common law, the unborn were recognized as a person with substantial rights. 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Chapter 1, p. 126; Appendix, p. A6. *See also infra*, footnote 29.

19 The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, 1 Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elders of Israel met with David at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral

is not to create rights,[20] it does define for whom the rights were created.[21]

The Preamble. reads:

> "We, the People of the United States, in Order; to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and **secure the Blessings of Liberty to** ourselves and **our Posterity**, do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

The words "People of the United States" and "citizens" are synonymous terms.[22] The Preamble creates two classes of sovereignty, "ourselves" and "our Posterity."[23] Its purpose appears to be to include "Posterity[24] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, 'Posterity" as to those who are lives in being, is synonymous, if not with "citizenship,"[25] surely "personhood."[26] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[27] In 1644, Milton argued that the, "Parliament could no more censure the issue of the mind than it could the issue of the womb."[28] At common law, certain members of future generations, "unborn children",[29] were lives in being for the purposes of the Rule Against Perpetuities.[30] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[31] and it does not appear that tort actions for the injuries were barred.[32] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation, a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration

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acknowledgments of human rights. The *Magna Carta, infra,* appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[20] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto) 542, 549. The 13th & 14th Amendments do not overrule *Scott*, but only remove the limitations found in Article I, thus enlarging the class of persons who are citizens.

[21] See, footnote 20, supra

[22] See, footnote 20, supra

[23] Lynch I , etc, supra, at page 1.

[24] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[25] See footnote 9, *ante*. It is probably more accurate to say the conceived "unborn children" are persons who become a naturalized citizen (§ I, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[26] Supra, footnotes 20 & 25, and page 10, after "*pari materia.*"

[27] Lynch I, , etc. supra, at page 12.

[28] Milton, AREOPAGITICA (1644).

[29] Ante at footnote18; Aristotle, Politics, VII, I335b, 24-26; Aquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. Exodus 21:22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington* Dept of Social Svcs for the Blind, 474 U.S. 481 (1986).

[30] Gray, THE RULE AGAINST PERPETUITIES (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[31] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them. Lord Coke, repeated by Blackstone, at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." Magna Carta (1215), Art. 54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) Medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[32] *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra*, 205 P. 917 (1922) ); Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135. And it appears that at a minimum, these common law rights were intended by Congress to be preserved. 1 U.S.C., § 8(c) , Appendix, p. A7.

of Independence[33] and the concept of an "indestructible and perpetual union,"[34] whereas if construed as a fee tail,[35] it would be consistent with an intent to create "unalienable rights" and a "perpetual union,"[36] for the protection of future generations, including the "unborn children".

The Constitution was submitted to the People for ratification.[37] Implicit in the Preamble is the concept that the Constitution is to be a social contract[38] wherein society promises the individual unalienable rights, in return for which the individual promises to

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33 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men, deriving their just powers from the consent of the governed, ...." American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

34 *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) (On Preamble.)

35 *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward* v. Howe, 12 Gray (Mass.) 49 (1858); *Gannon* v. *Athright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31(1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926); 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911), (recognizing by *dictum* common law rule). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. . . .")

36 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911) (Recognized by dictum common law rule).

37 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196,209, 565, 582, 590,651; 3 Rotunda, op cit., p. 663, note 1.

38 E.g., Hobbes, LEVIATAN (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE HUMAN RIGHTS READER (1979).



conform to the laws of society that do not derogate[39] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[40] As persons under the age of Capacity[41] could not consent,[42] it appears the framers intended adults to be of the class "ourselves," and all others, including "unborn children", of the class "Posterity."[43]

Taking the approach that "unborn children" are present members of "Posterity" answers a number of theoretical problems. *Casey, supra*, 505 U.S. at 860. (O'Connor, J.) First, it is the development of constitutional theory recognizing there is not just one right, or more precisely - life, at stake, but two, the mother's, a member of "ourselves," and her "unborn child", a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her "unborn child" is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives, if possible. Fourth, it assures a woman's right to medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts out of the quagmire of trying to guess when "viable" occurs. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

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39 Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937); Id, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL. 55 (1966).

40 Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed. Raym., 909 (1703)(English Reports).

41 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State account of age." 26th Amend, § 2.

42 Chitty on Contracts, op. cit..

43 2 Stephens Commentaries 342 (1841) .

## IV.

## SINCE ROE V. WADE, CONGRESS, WITH PLENARY CONTROL OVER NATURALIZATION, HAS APPARENTLY EXTENDED CITIZENSHIP STATUS TO THE "UNBORN CHILDREN", WHICH THIS COURT SHOULD ACCORD DEFERENTIAL RESPECT

The U.S. Supreme Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle v. United States*, 517 U.S. 416, 426 (1996).[44] While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e.g., Palermo v. United States*, 360 U.S. 343, 345-348 (1959), it may not supersede this Court's decisions interpreting and applying the Constitution. *See generally, City of Boerne v. Flores*, 521 U.S. 507, 517-521, *Dickerson v. U.S.*, 530 U.S. 428 (2000).

This case comes to the courts in a materially different posture than Dickerson. There, Congress attempted to overrule the Miranda decision and redefine a defendant's rights under the 5th Amendment in a manner inconsistent with an opinion of this Court.

In this case, Congress has, by its authority under Article I, § 8, clause 4, extended protection to a class of persons apparently recognized as members of Posterity, in the absence of any opinion from this Court defining the term Posterity as used in the Preamble.

It is conceded that that both Art. I, § 8, clause 18, and the 14th Amendment, § 5, are "a positive grant of legislative power" to Congress to "enact necessary and proper legislation to carry out that objective." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880) and *Boerne v. P.F. Flores*, 594 U.S. 511, 517 (1997), this Court explained the scope of Congress' § 5 power in the following broad terms:[45]

> "Whatever legislation is appropriate ... to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws ... denial or invasion, if not prohibited, is ... within the domain of congressional power."

Congress has plenary power over naturalization. Art. I, § 8, clause 4. Naturalization has been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 15, 162 (1989). Given the powers granted under Art. I, § 8, clause 18 and § 5 of the 14th Amendment, and the words in the Preamble, "to secure the blessing of liberty to ourselves and our Posterity" it would appear, *see infra*, that Congress could "adopt [Posterity, the conceived unborn,] and cloth[e them] with the privileges of a ... citizen," until they are born.

Given the right of Congress to "secure the blessings of liberty for ourselves and our Posterity", and Clause 4 power to regulate naturalization, this court should grant deference to the Congressional authority to abolish what it considers contrary to the principles found in the Constitution for the protection of human life, as "unborn children" are members of "Posterity."

## V.

## THE GOVERNMENT HAS A RIGHT TO PROTECT THE "UNBORN CHILDREN"

The Constitution Provides, in relevant part:

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[44] Once a federal claim [or defense] is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

[45] It is also true that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell, supra*, at 128 (opinion of Black, J.); E.g., *Boerne v. P.F. Flores*, [594] U.S. 511, 518 (1997) (Opinion by Kennedy, J.).

"No person shall be ... deprived of life ... without due process of law." U.S. Cons., 5th Amend.

No American government may utilize tax money to take life without due process of law.[46] *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, *arguendo*, that "unborn children" are present members of "Posterity," they have a right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §* 132, 135 (1st ed, 1911), to be heard on whether their lives should be terminated. *See generally, Midlane v. Central Hanover Bank*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it progeny; *Cruikshank, supra*, 92 U.S. (2 Otto), at 549; I Blackstone, Commentaries, etc., p. 126, App, p. B1.

On the side of the mother, a member of "ourselves", most, if not all, states have enacted legislation to protect young women and girls from unwanted pregnancy. Appendix, p. . The decision below undermines the ability of the several states to enforce those laws because by the secrecy, and hiding of the facts from the parents, sexual predators are likely to escape responsibility for their conduct.

As to "Unborn children", members of "posterity", they have all of the characteristics of life.[47] See generally, *To be and not to be*, supra; Fourteenth Amendment Personhood, supra, 72 St. John's L.R., at 534-39; Lynch I, supra; Lynch II, supra. Whether it can be ascertained at any point in time that "unborn children" are human is absurd;[48] if the parents are human they will be human.[49]

In the case of the partially born children, the case is even more compelling. The findings of Congress (Appendix, A8 – A21.) demonstrate the absurdity of the proposition that a partial birth abortion somehow protects the health of the mother. Indeed, the sole difference between a birth process in which the child survives, and the partial birth abortion, is that in the later the birthing process is interrupted for the sole purpose of killing the child, before allowing the process to be completed.

Given the obligation to ensure life is not taken without due process of law, and the dangers inherent in allowing sexual predators escape responsibility, it appears that the state has a legitimate interest in denying an absolute right to take the life of unborn or partially born children. The citizens of every state appear to have a legitimate interest in ensuring safeguards so that neither the mother nor the "unborn children" become victims of sexual abuse or genocide. (E.g., *International Convention on the Prevention and Punishment of the Crime of Genocide*, Congressional Digest, December 1984; U.S. Const., Art. VI, cl. 2

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[46] A state has the obligation to provide police protection for its citizens at home. (Verdross, *Forbidden Treaties International Law*, 31 AJIL 571 (1937); Verdross, *Jus Dispositivum & Jut Cogens in International. Law*, 60 AJIL 55(1966)). Protecting an individual through due process in American jurisprudence is derived from the *Magna Carta* (1215) . *Murray's Lessee v. Hoboken Land & Improvement* Co., 59 U.S. (18 How.) 272 (1856). McKechnie, *Magna* Carta; the Great Charter of King John. McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw. I *(Magna* Carta)(1297), p. 14, Notes, ¶ 2.

[47] Case & Stairs, Biology; OBSERVATION & CONCEPT (1971):, p. 110, excretion, pp. 122, 141, 143, 149-150; ingestion, pp. 70, 80; respiration, pp. 8, 51, 64, 77; irritation, pp. 267, 329, 330; reproduction, pp. 122, 163-165,298-299,327,329. A zygote has an individual developing life that is viable in *utero*, in contradistinction to the ovum and sperm, which are not. Id, pp. 324-327. See fn 48.

[48] See, *Stenberg v. Carhart*, supra, 530 U.S., at 953.

[49] The fact that the zygote is not viable extrauterine does not negate the existence of life. All life is environmentally dependent. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to cut the cord to test whether or not there was viability; such a proposition is absurd. Similarly, a fetus securely within the womb will die if there is an abruption of the placenta. Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979), page 93.

(treaties).[50] Accordingly, any law to the contrary would be void as repugnant to the doctrine of *jus cogens*.

In view of the foregoing, and the right of the government to "clothe [persons] with the privileges of citizenship", this court should give deference to the Congressional legislation regarding personhood in view of the plain language of the Preamble which appears to include the unborn as members of sovereignty, and *overrule Roe and its progeny* prospectively.

## CONCLUSION

Based upon the foregoing, this Court should *overrule Roe v. Wade,* 410 U.S. 113 (1973), and its progeny as inconsistent with the plain meaning of "Posterity" in the Preamble, reverse and remand for further proceedings not inconsistent with this court's views.

Dated: 7/29/2005

RESPECTFULLY SUBMITTED,

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50 Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d Amend. (Quartering of soldiers), and 4th Amend (search and seizure); *Katz v. United* States, 389 U.S. 347 (1967), and its progeny. But the right to privacy is not absolute. See footnote 5, *supra*.





## APPENDIX

## EXCERPTS FROM FARRAND, MAX, THE CONSTITUTIONAL DEBATES*

[129]

**COMMITTEE OF DETAIL, IV**

* **

[Proceedings of the Convention, June 19 -- July 23.]

**[152]**

**COMMITTEE OF DETAIL, IV**

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**VI**

We the People of *(and)* the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

**1.**

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**[163]**

**COMMITTEE OF DETAIL, IX**

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* * Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's, which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

**IX**

[same as previously reported]

**1.**

****

**[177]**

**Monday MADISON August 6**

**MADISON**

**Monday August 6th. In Convention**

*****

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: *****

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

**Article I**

**[196]**

**Tuesday MADISON**

**MADISON**

Teusday August 7th. In Convention

****

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

**[209]**

**Tuesday MCHENRY Augt 7**

**MCHENRY**

**Augt. 7.**

****

The preamble or caption and the 1. and 2. article passed without debate ....



****

**[565]**

**COMMITTEE OF STYLE**

**Proceedings of Convention Referred to the Committee of Style and Arrangement.**

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

**ARTICLE I.**

****

**[590]**

**COMMITTEE OF STYLE**

**Report of Committee of Style**

WE, the People of the United States, in order to form a more perfect union, to establish justice. insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

**ARTICLE I.**

****

**[604]**

****

**THURSDAY, SEPTEMBER 13,1787.**

**JOURNAL**

**Thursday September 13, 1787.**

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and

that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

**[604]**

[To postpoine the report respecting the 22nd and 23rd Ayes -- 9; noes -- 1.]

****

To strike out the word "to" before establish justice Ayes—8; Noes---2.]

**[641]**

**MONDAY, SEPTEMBER 17, 1787.**

**JOURNAL**

**Monday September 17, 1787.**

**Detail of Ayes and Noes**

| | The Constitution Unanimously agreed to. | To deliver over the Journal and papers to the President |
|---|---|---|
| | [567] | [568] | [569] |
| New Hampshire | Aye | Aye | aye |
| Massachusetts | Aye | Aye | aye |
| Rhode Island | Aye | Aye | aye |
| Connecticut | Aye | Aye | aye |
| New York | Aye | Aye | aye |
| New Jersey | Aye | Aye | aye |
| Pennsylvania | Aye | Aye | aye |
| Delaware | Aye | aye | aye |
| Maryland | Aye | aye | no |
| Virginia | Aye | aye | aye |
| North Carolina | Aye | aye | aye |
| South Carolina | Aye | dd | aye |
| Georgia | Aye | aye | aye |

**MADISON**



**Monday Sepr. 17. 1787. In Convention**

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ...

****

**[643]**

--- He then moved that the Constitution be signed ...

**[644]**

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

****

[649]

**MCHENRY**

**Monday Sepr. 1787.**

Read the engrossed Constitution. Altered the representation in the house of representatives.

****

**[651]**

**THE CONSTITUTION**

**OF THE UNITED STATES**

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

**ARTICLE I.**

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## 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND



atrocious a light, though it remains a very heinous miſdemeſnor[r].

AN infant *in ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to it. It may have a guardian aſſigned to it[s]; and it is enabled to have an eſtate limited to it's uſe, and to take afterwards by ſuch limitation, as if it were then actually born[t]. And in this point the civil law agrees with ours[u].

2. A MAN's limbs, (by which for the preſent we only underſtand thoſe members which may be uſeful to him in fight, and the loſs of which only amounts to maybem by the common law) are alſo the gift of the wiſe creator; to enable man to protect himſelf from external injuries in a ſtate of nature. To theſe therefore he has a natural inherent right; and they cannot be wantonly deſtroyed or diſabled without a manifeſt breach of civil liberty.

BOTH the life and limbs of a man are of ſuch high value, in the eſtimation of the law of England, that it pardons even homicide if committed *ſe defendendo*, or in order to preſerve them. For whatever is done by a man, to ſave either life or member, is looked upon as done upon the higheſt neceſſity and compulſion. Therefore if a man through fear of death or *maybem* is prevailed upon to execute a deed, or do any other legal act; theſe, though accompanied with all other the requiſite ſolemnities, are totally void in law, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance[v]. And the fame is alſo a ſufficient excuſe for the commiſſion of many miſdemeſnors, as will appear in the fourth book.

[r] 3 Inſt. 50.
[s] Stat. 12 Car. II. c. 24.
[t] Stat. 10 & 11 W. III. c. 16.
[u] *Vid. ff. de ſtatu hom.* [illegible]
[v] *Et si vero ſolus, in jure civili nulliger-* [illegible] *nec ſi servus coactus aquavit. Ff.* 1. 5. 26.
[w] 3 Inſt. 483.

The



## PARTIAL-BIRTH ABORTION BAN ACT OF 2003

**PUBLIC LAW 108-105, SEE PAGE 117 STAT. 1201**

**[3 US CODE CONG & ADMIN NEWS]**

DATES OF CONSIDERATION AND PASSAGE

*House: June 4, 2003*

*Senate: March 10, 11, 12, 13, 2003*

Cong. **Record Vol. 148** (2003)

House Conference Report No. 108-288, September 30, 2003

[To accompany S. 3]

*The House Conference Report is set out below.*

## HOUSE CONFERENCE REPORT 108-288

[{HCR,} page 1]

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[{HCR,} page 9]

## JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3), to prohibit the procedure commonly known as partial-birth abortion, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck all the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment that is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

## Section 1: Short title

Section 1 of the conference report is identical to Section 1 of the House amendment and Section 1 of the Senate bill. Section 1 states that the short title of this measure is the "Partial-Birth Abortion Ban Act of 2003."

[U.S. Cong, Admin & Leg News Service, p 1273]

## Section 2. Findings

Paragraph (1) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (1) in Section 2 of the House passed bill and paragraph (1) in Section 2 of the Senate passed bill. In paragraph (1) Congress finds that a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or, any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the child's brains) that the person knows will kill the partially delivered living infant, performs this act, and then completes delivery of the



dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

Paragraph (2) in Section 2 of the conference report is identical to paragraph (2) in Section 2 of the House amendment and paragraph (2) in Section 2 of the Senate bill. In paragraph (2), Congress finds that rather than being an abortion procedure that is embraced by the medical community, particularly among physicians

[{HCR,} page 10]

who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. Congress also finds that as a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

Paragraph (3) in Section 2 of the conference report is identical to paragraph (3) in Section 2 of the House amendment and paragraph (3) in Section 2 of the Senate bill. In paragraph (3), Congress finds that in Stenberg v. Carhart, 530 U.S. 914, 932 (2000), the United Stales Supreme Court, which did not have in front of it the extensive factual record compiled by Congress, construed the record in that case to support "he proposition that in some circumstances, [partial-birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Congress also finds that as a result of having reached this conclusion the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother, and placed an "undue burden" on women seeking abortions.

Paragraph (4) in Section 2 of the conference report is identical to paragraph (4) in Section 2 of the House amendment and paragraph (4) in Section 2 of the Senate bill. In paragraph (4), Congress finds that the Court's decision was based on the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures—findings which are contradicted by Congress's extensive factual record presented and compiled during the 104th, 105th, 107th, and 108th Congresses.

Paragraph (5) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (5) in Section 2 of the House passed bill and paragraph (5) in

[U.S. Cong, Admin & Leg News Service, p 1274]

Section 2 of the Senate passed bill. In paragraph (5) Congress finds that substantial evidence presented at the Stenberg trial, and the overwhelming evidence that was presented and compiled at extensive Congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

Paragraph (6) in Section 2 of the conference report is identical to paragraph (6) in Section 2 of the House amendment and paragraph (6) in Section 2 of the Senate bill. In paragraph (6), Congress finds that despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not



"clearly erroneous." Congress also finds that a finding of fact is clearly erroneous "when although there is evidence to support it,

[{HCR,} page 11]

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" Anderson v. City of Bessemer, North Carolina, 470 U.S. 564, 573 (1985). Congress also finds that under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 574.

Paragraph (7) in Section 2 of the conference report is identical to paragraph (7) in Section 2 of the House amendment and paragraph (7) in Section 2 of the Senate bill. In paragraph (7), Congress finds that in *Stenberg,* the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 Stale legislatures.

Paragraph (8) in Section 2 of the conference report is identical to paragraph (8) in Section 2 of the House amendment and paragraph (8) in Section 2 of the Senate bill. In paragraph (8), Congress finds that under well-settled Supreme Court jurisprudence, it is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Congress also finds that it is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and

draws reasonable inferences based upon substantial evidence.

Paragraph (9) in Section 2 of the conference report is identical to paragraph (9) in Section 2 of the House amendment and paragraph (9) in Section 2 of the Senate bill. In paragraph (9), Congress finds that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of Congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. * * * It is not for us to review the

[U.S. Cong, Admin & Leg News Service, p 1275]

congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case." Id. at 653.

Paragraph (10) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (10) in Section 2 of the House amendment and paragraph (10) in Section 2 of the Senate bill. In paragraph (10), Congress finds that Katzenbach's highly deferential review of Congress's factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965, (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the

[{HCR,} page 12]



Act, state actions discriminatory in effect are discriminatory in purpose." *City of Rome, Georgia* v. *U.S.*, 472 F. Supp. 221 (D. D.C. 1979), affd, 446 U.S. 156 (1980). "

Paragraph (11) in Section 2 of the conference report is identical to paragraph (11) in Section 2 of the House amendment and paragraph (11) in Section 2 of the Senate bill. In paragraph (11), Congress finds that the Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 512 U.S. 622 (1994) *(Turner I)* and *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 520 U.S. 180 (1997) *(Turner If)*. Congress finds that at issue in the *Turner* cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized." Congress finds that the *Turner I* Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,' "its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo. or to replace Congress' factual predictions with our own. Rather, it is to assure that in formulating its judgments Congress has drawn reasonable inferences based on substantial evidence." Id. at 666.

Paragraph (12) in Section 2 of the conference report is identical to paragraph (12) in Section 2 of the House amendment and paragraph (12) in Section 2 of

the Senate bill. In paragraph (12), Congress finds that three years later in *Turner II*, the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments. Congress has drawn reasonable inferences based on substantial evidence.'" 520 U.S. at 195. Congress finds that, citing its ruling in *Turner I*, the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," Id. at 195, and added that it "owe[d] Congress' findings an additional measure of deference out *of* respect for its authority to exercise the legislative power." Id. at 196.

[U.S. Cong, Admin & Leg News Service, p 1276]

Paragraph (13) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (13) in Section 2 of the House amendment and paragraph (13) in Section 2 of the Senate bill. In paragraph (13), Congress finds that there exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a "health" exception, because the facts demonstrate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress also finds

[{HCR,} page 13]

that it has been informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. Congress finds that these findings reflect its very informed judgment that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a



woman's health,' and lies outside the standard of medical care, and should, therefore, be banned.

Paragraph (14) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (14) in Section 2 of the House amendment and paragraph (14) in Section 2 of the Senate bill. In paragraph (14), Congress, pursuant to the substantial and credible testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, lists its declarations regarding the partial-birth abortion procedure:

Paragraph (14)(A) in Section 2 of the conference report is identical to paragraph (14)(A) in Section 2 of the House amendment and paragraph (14)(A) in Section 2 of the Senate bill. In paragraph (14)(A), Congress declares that a partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for * * * other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death. Therefore, Congress concludes that those who express the view that partial-birth abortion may be a safer method of abortion in some circumstances have never examined the severe risks of the procedure to the health of the

mother and have not demonstrated that this procedure is a safe, medically accepted, standard of care.

Paragraph (14)(B) in Section 2 of the conference report is identical to paragraph (14)(B) in Section 2 of the House amendment and paragraph (14)(B) in Section 2 of the Senate bill. In paragraph (14)(B), Congress declares that there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. Congress also declares that no controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Congress further declares that there have

[U.S. Cong, Admin & Leg News Service, p 1277]

been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Congress also declares that unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abort-

[{HCR,} page 14]

ions that include the instruction in partial-birth abortions in their curriculum.

Paragraph (14)(C) in Section 2 of the conference report is identical to paragraph (14)(C) in Section 2 of the House amendment and paragraph (14)(C) in Section 2 of the Senate bill. In paragraph (14)(C), Congress declares that a prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use." The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and



the public, is "ethically wrong," and "is never the only appropriate procedure."

Paragraph (14)(D) in Section 2 of the conference report is identical to paragraph (14)(D) in Section 2 of the House amendment and paragraph (14)(D) in Section 2 of the Senate bill. In paragraph (14)(D), Congress declares that those who espouse the view that partial-birth abortion "may" be the most appropriate abortion procedure for some women in "some" circumstances, such as the plaintiff in *Stenberg* v. *Carhart* and the experts who testified on his behalf, have failed to identify such circumstances and base their opinion on theoretical speculation, not actual evidence that demonstrates the relative safety of this abortion procedure.

Paragraph (14)(E) in Section 2 of the conference report is identical to paragraph (14)(E) in Section 2 of the House amendment and paragraph (14)(E) in Section 2 of the Senate bill. In paragraph (14)(E), Congress declares that the physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

Paragraph (14)(F) in Section 2 of the conference report is identical to paragraph (14)(F) in the House amendment and paragraph (14)(F) in the Senate bill. In paragraph (14)(F), Congress declares that a ban on the partial-birth abortion procedure will advance the health interests of pregnant women seeking to terminate a pregnancy.

Paragraph (14)(G) in Section 2 of the conference report is identical to paragraph (14)(G) in the House amendment and paragraph (14)(G) in the Senate bill. In paragraph (14)(G), Congress declares that in light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. Congress also declares that in addition to promoting ma-

ternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Paragraph (14)(H) in Section 2 of the conference report is identical to paragraph (14)(H) in the House amendment and (14)(H) in the Senate bill. In paragraph (14)(H), Congress declares that based upon *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises, in part, by vir-

[U.S. Cong, Admin & Leg News, p 1278]

[{HCR,} page 15]

tue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. Congress further declares that this distinction was recognized in *Roe* when the Court noted, without comment that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. Congress declares that this interest becomes compelling as the child emerges from the maternal body. Congress declares that a child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Congress declares that partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Partial birth gives the fetus an autonomy that is separate and distinct from that of the mother. Thus, the government has a heightened interest in protecting the life of the partially-born child.

Paragraph (14)(I) in Section 2 of the conference report is identical to paragraph (14)(I) in Section 2 of the House amendment and paragraph (14)(I) in Section 2 of the Senate bill. In paragraph (14)(I), Congress declares that the distinction between a partial-birth



abortion and other abortion methods has been recognized by the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb." According to this medical association, the " 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body."

Paragraph (14)(J) in Section 2 of the conference report is identical to paragraph (14)(J) in Section 2 of the House amendment and paragraph (14)(J) in Section 2 of the Senate bill. In paragraph (14)(J), Congress declares that a partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Congress further declares that a partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

Paragraph (14)(K) in Section 2 of the conference report is identical to paragraph (14)(K) in Section 2 of the House amendment and paragraph (14)(K) in Section 2 of the Senate bill. In paragraph (14)(K), Congress declares that by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

Paragraph (14)(L) in Section 2 of the conference report is identical to paragraph (14)(L) in Section 2 of the House amendment and paragraph (14)(L) in Section 2 of the Senate bill. In paragraph (14)(L), Congress declares that the gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity

[U.S. Cong, Admin & Leg News, p 1279]

[{HCR,} page 16]

to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Paragraph (14)(M) in Section 2 of the conference report is identical to paragraph (14)(M) in Section 2 of the House amendment and paragraph (14)(M) in Section 2 of the Senate bill. In paragraph (14)(M), Congress declares that the vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. Congress further declares that it is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Evidence compiled by Congress demonstrates that fetuses on whom in utero surgery is performed for medical reasons feel pain from needles and instruments and are provided anesthesia. Pain management is an important part of care provided to infants cared for in neonatal units who are of the same gestational ages as those subject to partial-birth abortion. Partial-birth abortion is an extremely painful procedure for the fetus and, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

Paragraph (14)(N) in Section 2 of the conference report is identical to paragraph (14)(N) in Section 2 of the House amendment and paragraph (14)(N) in Section 2 of the Senate bill. In paragraph (14)(N), Congress declares that implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Congress further declares that as a result it has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.



Paragraph (14)(0) in Section 2 of the conference report is identical to paragraph (14)(0) in Section 2 of the House amendment and paragraph (14)(0) in Section 2 of the Senate bill. In paragraph (14)(0), Congress declares that for these reasons, it finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

### Section 3. Prohibition on partial-birth abortions

Subsection (a) in Section 3 of the conference report is identical to subsection (a) in Section 3 of the House amendment and subsection (a) in Section 3 of the Senate bill. In subsection (a) of Section 3 Congress amends title 18 of the United States Code by inserting anew chapter 74 consisting of a new 18 U.S.C. 1531:

Subsection (a) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (a) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (a) of the new section 1531 proposed in Section 3(a) of

[U.S. Cong, Admin & Leg News Service, p 1280]

| STATE | AGE | Citation | Remarks |
|---|---|---|---|
| ALABAMA | 16 | Section 13A-6-62 | Second Degree Rape |
| ALASKA | 13 | Sec. 11.41.434. | Sexual abuse of a minor in the first degree. |
| ARIZONA | 18 | 13-1405, -1410 (age 15); -1417 (age 14). | Molestation of child; classification |
| ARKANSAS | 14 | 5-14-103 | Rape. |
| California | 18 | | Unlawful sexual intercourse |
| COLORADO | 15 | 18-3-402 | Rape |
| CONNECTICUT | 15 | Sec. 53a-73a. | Sexual assault |
| DELAWARE | 18 | 11-5-§ 768. | Unlawful sexual contact in the second degree; class G felony |
| DISTRICT OF COLUMBIA | 16 | DC CODE s 22-3001, 3009 | Unlawful Sexual contact |
| FLORIDA | 12 | 46-794-794.011, 794.05 | Sexual battery.-- |
| GEORGIA | 16 | 16-6-5. | (Enticing child for indecent purposes. |
| HAWAII | 16 | | Unlawful sex |
| IDAHO | 18 | 18-6101 | RAPE DEFINED. |
| ILLINOIS | 17 | Sec. 11-6. | Indecent solicitation of a child. |
| INDIANA | 14 | IC 35-42-3 | Child molesting |
| IOWA | 14 | 16-709- 702 & -709.1 | Sexual abuse defined.. |



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| KANSAS | 14 | 21-3502. | Rape |
| KENTUCKY | 16 | 50.510.020 | Lack of consent. |
| LOUISIANA | 15 | 14: 43.1 | Sexual battery |
| MAINE | 14 | 17A-11-254 & -255, | § 255 Unlawful sexual contact<br>§254. Sexual abuse of minors |
| MARYLAND | 14 | 3-3-304 | Rape in the second degree. |
| MASSACHUSETTS | 16 | 4-1-265-23 | Rape and abuse of child |
| MICHIGAN | 13 | 750.520b, 520c(a). | Criminal sexual conduct in the first degree; felony. |
| MINNESOTA | 13 | 609.343 or .345 | 609.343 Criminal sexual conduct in the second degree. |
| MISSISSIPPI | 14 | 97-3-65 | Rape; carnal knowledge of child under fourteen years of age. |
| MISSOURI | 14 | 566.032. | Statutory rape |
| MONTANA | 16 | 45-5-501. | Definition of the term "without consent" |
| NEBRASKA | 14 | 28- 319, 320.01, & 805 | 28-319 Sexual assault; first degree; penalty. †<br>28-320.01 Sexual assault of a child; penalties. †<br>28-805 Debauching a minor; penalty. † |
| NEVADA | 16 | NRS 200.364 | Definitions "Statutory sexual seduction" |

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| NEW HAMPSHIRE | 13 | | 632-A:2 Aggravated Felonious Sexual Assault. |
| NEW JERSEY | 13 | 2C:14-2. | Sexual assault. |
| NEW MEXICO | 13 | 30-9-11, -12 & -13. | Criminal sexual penetration. (2001) |
| NEW YORK | 17 | 40.130.05 | A person is deemed incapable of consent |
| NORTH CAROLINA | 13 | 14-27.2, .4 & .7A | § 14-27.2. First-degree rape.<br>§ 14-27.4. First-degree sexual offense.<br>§ 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old. |
| NORTH DAKOTA | 14 | 12.1-20-01, -03, | 12.1-20-03. Gross sexual imposition. |
| OHIO | 13 | 2907.01, .02, & .04 | Rape.<br>Unlawful sexual conduct with minor. |
| OKLAHOMA | 16 | 21-45-1111 | Rape |
| OREGON | 18 | 163.315 | Incapacity to consent; effect of lack of resistance. |
| PENNSYLVANIA | 13 | 18-31-3102, 3121, and – 3122.1 | Mistake as to age.<br>Rape.<br>Statutory sexual assault. |
| RHODE ISLAND | 16 | 11-37-6<br>11-37-8.1 | Third degree sexual assault.<br>First degree child molestation sexual assault. – |
| SOUTH CAROLINA | 14 | 16-3-655 | Criminal sexual con- |



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| CAROLINA | | | duct with minors. |
| SOUTH DAKOTA | 16 | 22-22-1. | Rape defined -- Degrees -- Felony. |
| TENNESSEE | 18 | 39-13-506. | Statutory rape. |
| TEXAS | 17 | 5-21.11 | Indecency With a Child |
| UTAH | 18 | 76-5-401<br>76-5-401.2. | Unlawful sexual activity with a minor -- Elements -- Penalties -- |
| VERMONT | 16 | 13 V.S.A. 3252 | Sexual assault |
| VIRGINIA | 16 | 18.2-61.<br>18.2-63. | Rape.<br>Carnal knowledge of child between thirteen and fifteen years of age. |
| WASHINGTON | 16 | 9A.44.073<br>9A.44.076<br>9A.44.079<br>51 | Rape of a child in the first degree<br>Rape of a child in the second degree<br>Rape of a child in the third degree |
| WEST VIRGINIA | 16 | 61-8B-2<br>61-8B-5 | Lack of consent. |
| WISCONSIN | 18 | 948.01<br>948.02 | Sexual assault of a child.<br>(1) First degree sexual assault.<br>(2) Second degree sexual assault |
| WYOMING | 16 * | 6-2-303<br>6-2-304 | Sexual assault in the second degree.. |

---

51 There are other statutes, which involved A inducing B, actor, to have sex with C, a minor. The age limits under those circumstances is somewhat higher, and involve special relationships between the actor and minor. Those statutes appear to regulate activity for reasons other than statutory rape or consent of the minor.

| | | | |
|---|---|---|---|
| | | 6-2-308. | Sexual assault in the third degree. |
| Count 51 | | | |
| Average Age: | 15.26 | | |
| Minimum Age: | 12 | | |
| Maximum Age: | 18 | | |
| Number of States @ 18 | 8 | 16.0% | |
| Number of States @ 17 | 3 | 6.0% | |
| Number of States @ 16 | 16 | 32.0% | |
| Number of States < 16 | 23 | 46.0% | |

No. 04-1144

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

# In The Supreme Court of the United States

**KELLY A. AYOTTE,**
**Attorney General of the State of New Hampshire,**

***Petitioner,***

**v.**

**PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.,**

***Respondents.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

The Rutherford Institute is participating as *amicus* herein because it regards this case as an extraordinary opportunity for the Court to apply principles of law that acknowledge the rights reserved to states and the people to protect minors who confront serious life-changing decisions such as abortion.

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. Counsel for the parties did not author any part of this brief. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

## STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Ayotte.

## SUMMARY OF ARGUMENT

The New Hampshire Parental Notification Prior to Abortion Act does not radically change the relationship between parents and their children. The Act merely seeks to defend the firmly rooted tradition of parents being involved in the major life decisions of their minor children by affirming parents in their role as guides and caregivers. The instant case questions whether a minor's extraordinary decision about abortion should be governed by a set of special, judge-made rules that exempt minors from routine parental involvement required generally in American law.

The Respondents challenge the facial validity of the New Hampshire Parental Notification Prior to Abortion Act and ask this Court to strike it down because, they assert, in some hypothetical circumstances it may be invalid. This Court, however, does not recognize application of the "overbreadth" doctrine "outside the limited context of the First Amendment." *United States v. Salerno*, 481 U. S. 739, 746 (1987). The prudential policy limiting overbreadth challenges to Free Speech cases is designed to prevent Federal Courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted by the Constitution to the democratically elected branch of government. In cases involving non-First Amendment-related facial challenges, as this one, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently

weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Here the Respondents cannot establish that "no set of circumstances exists under which the Act would be valid." *Id.* at 745. In other words, the Respondents cannot succeed in their facial challenge because, on its face, the New Hampshire legislation is rationally related to a legitimate state objective and the means are reasonable in achieving the objective. *Id.*

In this case, the State of New Hampshire is advancing a bedrock principle that is widespread in American law. The legal system in the United States has historically protected minors when making important life decisions by requiring parental consent for those choices. Medical procedures provide one of the strongest examples of the parental consent requirement, since parents must consent for most medical care for their minor children. Additionally, the New Hampshire legislature, like many other states, carries the protection of minors even further by placing significant restrictions on minors' decisions; for example, completely prohibiting minors from engaging in activities such as tattooing. N.H. Rev. Stat. Ann. § 314-A:8 (2004). Even though certain exceptions are carved out from these general rules, the overarching policy of protecting minors remains firmly intact, especially for critical life decisions such as abortion.

The nature and language of abortion testifies to the extraordinary character of the decision, lifting it to a higher standard than tattoos. Since the law regularly requires minors to obtain parental consent for most life decisions, the standard should not be obliterated for an important medical decision such as abortion. To alleviate fears about the abortion decision being unduly burdened or overridden by a parent, the Act does not require *consent* of *both* parents, but only *notification* of a *single* parent. This lower standard still protects the tradition of parental involvement, while lessening any ostensible or hypothetical burden on the minor.

If the Court does not reverse the First Circuit's decision in the instant case, irreparable damage will be done to the parent-child relationship in one of the most traumatic of life decisions, whether to terminate what this Court has termed as "potential life."

## ARGUMENT

### INTRODUCTION.

The New Hampshire Parental Notification Prior to Abortion Act imposes criminal penalties on a physician's failure to provide 48 hours advance notice to parents of their child's impending abortion.[2] The Respondents allege that the Act is constitutionally invalid "on its face" because it fails to provide an exception for the health of the pregnant child. This brief addresses the important state interests the New Hampshire legislature has consistently advanced in legislation affecting the health and welfare of children and the proper standard of review to be applied in a "facial" challenge to the New Hampshire legislature's requirement of parental notification.

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[2] N. H. Rev. Stat. Ann. §§ 132:24 et seq. (2004). The New Hampshire legislature required forty-eight hours advance notice to a child's parent before an abortion can be performed, unless a parent waives notice in writing. Notice may be given in person or by certified mail, but is not required if the child confidentially petitions a court (in expedited proceedings) for waiver of notice. Notice may also be waived if a physician certifies that an abortion is necessary to prevent a minor's death and time is insufficient to provide notice. Failure to follow the notice procedures of the Act subjects the violator to a misdemeanor.

## I. RESPONDENTS CANNOT PREVAIL IN THIS FACIAL CHALLENGE TO THE NEW HAMPSHIRE ACT BECAUSE THEY CANNOT MEET THE STANDARD OF REVIEW SET FORTH IN *UNITED STATES V. SALERNO*.

When the constitutionality of a statute is challenged on its face in a non-Free Speech case, this Court applies the standard of review set forth in *United States v. Salerno*, 481 U. S. 739, 746 (1987). In *Salerno*, this Court declared that "[a] facial challenge to a legislative Act is... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. It is not enough that an Act's unconstitutionality under *some* circumstances might render it invalid; rather, the Court requires a showing that the law is invalid in virtually *all* of its applications. Thus, the "overbreadth" doctrine is not recognized "outside the limited context of the First Amendment." *Id.* This rule of judicial self-restraint serves as a prophylactic obstructing the Federal courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted in the U. S. Constitution to the democratically elected branches of government, Federal and State. In such cases, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Thus, in reviewing this facial challenge to the New Hampshire legislature's parental notification requirement, the central issue is whether the legislation is rationally related to a legitimate state objective and the means reasonable in achieving the objective. *Id.* More specifically, are the Act's procedures rationally related to legitimate legislative concerns for the parent-child